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No. 92-160

IN THE
Supreme Court of the United States
October Term, 1992

RONNIE LEE AND MACKEY LEE,
INDIVIDUALLY AND AS PARENTS AND
NATURAL GUARDIANS OF MICHAEL LEE, A MINOR,
Petitioners,

v.

RICHARDSON-MERRELL, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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September 24, 1992

REPLY TO BRIEF IN OPPOSITION

Merrell's central claim in opposing certiorari in this case and in the related *Turpin* case[1] is that the Sixth Circuit below has rendered only a "fact specific application of established summary judgment standards," and that this Court is being asked "to determine the quantum of evidence required" in a case that happens to involve injuries claimed to result from Bendectin. Opposition ("Opp.") 1. That claim is rendered frivolous, and the core legal issue posed by the Petition is cleanly revealed, by Merrell's own discussion of the D.C. Circuit's recent Rule 56(e) decision in *Ambrosini v. Labarraque*, Nos. 90-7146 & 90-7148 (D.C. Cir. June 12, 1992) (reprinted as Appendix D to Petition).

As pointed out in the Petition, *Ambrosini* reversed a district court grant of summary judgment on causation even though plaintiffs there presented only conclusory expert opinions that failed to recite specific underlying facts, holding (in accord with other circuits) that expert conclusions on given facts, standing alone, *themselves* "set forth specific facts" within the meaning of Rule 56(e). Pet. 17-18. Merrell agrees that the D.C. Circuit properly denied summary judgment but emphasizes that the plaintiffs in *Ambrosini* "opposed summary judgment with affidavits containing only 'bare conclusion[s]' about causation." Opp. 16. Merrell points out that in the instant case, however, petitioners' experts elected to provide the district court with *more* than bare conclusions: here, "the record is far from bare. It contains affidavits and actual testimony from other cases clearly delineating the bases upon which Petitioners relied." Opp. 17.

Thus, according to Merrell's Kafkaesque logic, the *Ambrosini* plaintiffs, whose experts gave only "bare conclusions," could not be denied a trial by the district court, but petitioners here, whose experts far exceeded a "conclusory" level of detail, *could* be denied a trial. According to Merrell, as soon as petitioners' experts below provided any detail about their opinions, the district court was empowered under Rule 56(e) to decide if those opinions

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[1] *See Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349 (6th Cir. 1992), *petition for certiorari filed*, No. 91-1987 (June 9, 1992). As noted in the Petition ("Pet."), at 8-9, the instant Petition should either be held (at minimum) or granted and consolidated for argument, if the *Turpin* petition is granted.

were plausible. This was, of course, exactly the approach of the Sixth Circuit below, which asked: "How hard should judges look at the reasonableness of scientific theories and inferences before they decide whether there is enough in the case for it to go to the jury?" (**A23**). "[H]ow far [should judges] enter the scientific thicket of conflicting inferences in order to determine whether the basis of a scientific opinion concerning causation is sufficiently plausible to allow a jury to ground a verdict on it"? (**A23**). Its answers were: "quite hard," and "quite far." The Sixth Circuit held that courts may second-guess, refuse to believe, and withhold from the jury the admissible opinions of qualified experts, by applying an *ad hoc* "'hard look' doctrine . . . in scientific cases based primarily on expert testimony," because "close judicial analysis of such technical and specialized matter is necessary" to combat "juror misunderstanding" and potentially biased experts. (**A23-A24**).

This legal standard is diametrically opposed to the D.C. Circuit's approach to scientific expert opinion testimony. As pointed out in the Petition at 17, *Ambrosini* reaffirmed the D.C. Circuit's landmark opinion in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1535 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984), holding that — in the face of detailed and conflicting expert testimony on scientific causation — the credibility of admissible expert testimony must be reserved for the jury. The approach of *Ambrosini* and *Ferebee* flows from a straightforward reading of the expert testimony rules, combined with the language of Fed. R. Civ. 56(e) and this Court's interpretations of Rule 56(e), particularly its recognition in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 255 (1986), that on a summary judgment motion the judge "is not himself to weigh the evidence and determine the truth of the matter," and that "[c]redibility determinations . . . are jury functions." *See* Pet. 15-18.

Merrell's strained factual distinctions concerning cases in other circuits that have followed the D.C. Circuit's approach to expert testimony on summary judgment, *see* Opp. 15-18, cannot obscure the flat legal holdings at issue. The Ninth Circuit, after initially noting that there are two entirely plausible, but opposite, ways to read Rule 56(e) in the context of expert testimony, *see* Pet. 13-14, ultimately held that "[e]xpert opinion is admissible and may defeat

summary judgment if it appears the affiant is competent to give an expert opinion and the factual basis for the opinion is stated in the affidavit, even though the underlying factual details and reasoning upon which the opinion is based are not." *Bulthuis v. Rexall*, 789 F.2d 1315, 1318 (9th Cir. 1985).[2] The Tenth Circuit considers it a "truism" that "'an expert's opinion or interpretation of evidence is itself evidence.'" *Quinton v. Farmland Indus., Inc.*, 928 F.2d 335, 338 (10th Cir. 1991) (citation omitted).

These courts and others have recognized that the plain language of Rule 56(e) requires not detailed information on a given claim, but merely *some* affirmative evidence that is in admissible *form* on each "specific fact" on which summary judgment is opposed. Only last week, for example, the Seventh Circuit rejected the suggestion that "plaintiff's bare denials [of wrongdoing], regardless of their form, could not create a genuine issue of fact to preclude summary judgment," and held that an admissible affidavit on a given "specific fact" "will constitute such affirmative evidence to defeat a summary judgment motion . . . even if it includes only bare denials." *Scherer v. Rockwell International Corp.*, 1992 U.S. App. LEXIS 22080, at *11-*12 (7th Cir. Sept. 16, 1992). Other appellate decisions besides those of the Sixth Circuit below, of course, rely on a different view of Rule 56(e), *see* Pet. 13-15, clearly pointing to the need for a grant of certiorari in this case.

Nothing in the factual record of this case renders it an inappropriate vehicle for review of the important and purely legal issue of the proper interpretation of Rule 56(e). Plainly, this Court may determine and articulate the correct legal standard without extensive inquiry into the particular scientific record or specific facts of this case. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317 (1985) (setting forth legal standard under Rule 56 without detailed analysis of the underlying factual record). Nor is there any relevance to Merrell's observation that "none of

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[2] The *Bulthuis* decision represented a turning point for the Ninth Circuit, essentially reversing that Circuit's position, enunciated in *United States v. Various Slot Machines*, 658 F.2d 697, 700 (9th Cir. 1981), that "in the context of a motion for summary judgment the expert must back up his opinion with specific facts." *See* Pet. 13-14.

[petitioners' experts] actually . . . concluded that Bendectin caused this specific plaintiff's birth defects," and that this "is, in itself, fatal to Plaintiffs' cause of action." Opp. 5-6. Petitioners had no obligation to advance such testimony because, as quoted on page 2 of the Petition without contradiction, Merrell's filing under Rule 56(c) contested causation based *only* on the *general* proposition that "Bendectin does not cause defects of any type," and therefore petitioners were obligated under Rule 56(e) only to set forth admissible evidence going to this general issue.

Separate from the Rule 56(e) issue, of course, is whether the Sixth Circuit should be permitted to harmonize supposedly "inconsistent" jury verdicts by promulgating a customized "hard look" doctrine for scientific evidence, which permits district courts to "judge for [themselves] the validity of the reasoning process by which various competing qualified experts have reached their conclusions." (**A18**). Merrell offers no rejoinder to the several fundamental constitutional arguments — covering inherent judicial power, the Seventh Amendment, *Erie* and due process — advanced in the Petition at 19-28. Merrell simply pretends that the Sixth Circuit below applied settled summary judgment standards, and again suggests that petitioners merely complain about the outcome of their case under this unexceptional framework. Opp. 18-21. But the Sixth Circuit candidly and forcefully set out to devise a new and different standard to govern scientific expert testimony, in a quest for nationwide consistency in adjudication of similar issues, and came up with an explicit "hard look" doctrine which it used to dispose of petitioners' claims. Whether it had authority to do so, and whether its approach is preferable to that of other circuits which reject such special rules, *see* Pet. 25-26, are issues clearly worthy of review.

CONCLUSION

For all these reasons, certiorari should be granted.

Respectfully submitted,

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